Supreme Court, U. S.
FILED
JUL 24 1980
MICHAEL RODAK, JR., CLERK

No. 79-1344

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1980

MICHAEL M.,
Petitioner,

VS.

THE SUPERIOR COURT OF SONOMA COUNTY,
THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondents

On Writ of Certiorari to the Supreme Court of California

JOINT APPENDIX

PETITION FOR CERTIORARI FILED MARCH 1, 1980
CERTIORARI GRANTED JUNE 9, 1980

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7662

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The following opinions, decisions, judgments, and orders have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Petition for Writ of Certiorari:

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

September 6, 1978	Petition for Writ of Prohibition Filed in the Court of Appeal of California, First Appellate District, Division Three.
September 14, 1978 ..	Order entered denying Petition for Writ of Prohibition.
October 12, 1978	Order of the Supreme Court of California entered granting Petition for Hearing.
October 17, 1978	Alternative Writ of Prohibition issued.
October 18, 1978	Alternative Writ of Prohibition filed.
November 3, 1978	Return to Alternative Writ of Prohibition filed.
November 5, 1979	Opinion and judgment of the Supreme Court of California.
November 19, 1979	Petition for Rehearing filed.
December 5, 1979	Order entered denying Petition for Rehearing.

In the Court of Appeal of the State of California
For the First Appellate District

Division Three

No. 1 Civ. 44994
Superior Court
No. 9132-C

Michael M.
Petitioner,

vs.

The Superior Court of the State of California, in and for the County of Sonoma,
Respondent,

The People of the State of California,
Real Party In Interest.

[Filed Sept. 6, 1978]

PETITION FOR WRIT OF PROHIBITION

To the Honorable Presiding Justice and Associate Justices of the Court of Appeal of the First Appellate District:

Petitioner alleges:

1. A related appeal is pending in the case entitled "The People of the State of California v. Charles Tillmon McKellar, No. 2 Crim 30376", before the Supreme Court of California.

2. Petitioner is the defendant in that certain action described in paragraph 11, *infra,* now pending before the respondent Court.

3. Petitioner has been released on his own recognizance on the charge alleged in the action pending before the respondent Court.

4. Respondent is the Superior Court of the State of California, in and for the County of Sonoma.

5. The Real Party in Interest is the People of the State of California.

6. On June 4, 1978, Petitioner was arrested by Detective Robert Weiworka of the Rohnert Park Police Department.

7. On June 6, 1978, a petition was filed in Superior Court of the State of California for the County of Sonoma sitting as a juvenile court pursuant to Section 602 of the Welfare and Institutions Code. On June 26, 1978, the Defendant was found not a fit and proper subject to be dealt with under the juvenile court law pursuant to Section 707(a) of the Welfare and Institutions Code.

8. On or about June 28, 1978, a verified complaint was filed with a magistrate of the Municipal Court of the State of California, County of Sonoma, entitled "The People of the State of California v. *Michael M.*, Defendant, Case No. 54029", charging the Petitioner with violation of Section 261.5 of the Penal Code.

9. On July 13, 1978, a preliminary examination was held before the Honorable Frank J. Passalacqua, Judge of the Municipal Court of the County of Sonoma, acting as magistrate, at which examination testimony was taken.

10. At the conclusion of the preliminary examination, the magistrate ordered that Petitioner be held to answer in the Superior Court and that he be continued to be released on his own recognizance.

11. On July 27, 1978, an Information was filed in the respondent Court entitled "The People of the State of California, Plaintiff, vs. *Michael M.*, Defendant," charging Petitioner with a violation of Section 261.5 of the Penal Code. A true copy of the Information is attached hereto as Exhibit "A" and made a part hereof.

12. On July 27, 1978, Petitioner was arraigned on the Information before the respondent Court, the Honorable R. Bryan Jamar presiding, and at said time, through counsel, Petitioner moved pursuant to Section 995 of the Penal Code to set aside the Information on the ground that Petitioner was indicted without reasonable or probable cause in that Penal Code Section 261.5 is unconstitutional on its face and as applied and violates the Equal Protection Clauses of both the United States and California Constitutions. On said date Petitioner waived his constitutional right to a speedy trial.

13. The Petitioner is a minor male who was born on December 5, 1960. The Petitioner is informed and believes, and upon such information and belief alleges that the alleged victim of the said offense charged was born on December 23, 1961.

14. On August 22, 1978, the Petitioner's said motion was heard before the Honorable John J. Gallagher, Judge of the respondent Court, and was thereupon denied.

15. On July 27, 1978, Petitioner entered a plea of not guilty. Petitioner's trial on the charge has been set for October 10, 1978, and, unless prohibited by this Court, the respondent Court will proceed to try the case as scheduled.

16. In denying Petitioner's motion to set aside, the respondent Court acted in excess of its jurisdiction in that, as a matter of law, it was required to grant Petitioner's motion and set aside the Information.

17. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law other than by this Petition in that there is no appeal from said order, and this proceeding by prohibition is expressly authorized by Section 999(a) of the Penal Code.

18. Petitioner is a party beneficially interested in this proceeding, and Petitioner, Respondent, and Real Party in Interest are the parties who will be affected by this proceeding.

19. No other petition for writ of prohibition has been made by or on behalf of the Petitioner relating to this matter.

WHEREFORE, Petitioner prays that:

1. An alternative writ of prohibition be issued restraining respondent Court from taking any further steps or proceedings, including trial in the criminal action against Petitioner now pending in respondent Court entitled "The People of the State of California, Plaintiff, vs. *Michael M.*, Defendant", Case No. 9132-C, until further order of this Court.

2. Respondent be directed to show cause before this Court, at a specified time and place, why it should not be absolutely and permanently restrained from taking any further proceedings against, or making any other or further orders affecting the Petitioner in the action herein above described.

3. Petitioner be granted such other and further relief as may be appropriate and just.

Dated: September 5, 1978.

Gregory F. Jilka
Teresa de la O

By Gregory F. Jilka
Attorneys for Petitioner

[Verification, Points and Authorities, and Certificate of Service omitted in printing.]

Exhibit A

Gene L. Tunney, District Attorney
County of Sonoma
212J Hall of Justice
P.O. Box 1964
Santa Rosa, CA 95402
(707) 527-2311
Attorney for The People

Superior Court of the State of California,
County of Sonoma

Court No. 9132-C
D.A. No. 13808
INFORMATION
Ct. I—261.5 PC

The People of the State of California,
Plaintiff,

vs.

Michael M.,
Defendant.

[Filed July 27, 1978]

COUNT I

Michael M. is accused by the District Attorney of the County of Sonoma, State of California, by this information, of a felony, to wit: unlawful sexual intercourse, in that on or about the 4th day of June, 1978, in the County of Sonoma, State of California, the said defendant did violate Section 261.5 of the Penal Code in that he did wilfully, unlawfully and feloniously have and accomplish an act of

sexual intercourse with a female person, to wit: *Sharon,* born 12-23-61, not his wife, who was then and there under the age of eighteen years, to wit: 16 years of age.

Contrary to the form, force and effect of the Statute in such case made and provided, and against the peace and dignity of the People of the State of California.

Gene L. Tunney, District Attorney of the
County of Sonoma, State of California

By /s/ David L. Dunn
David L. Dunn, Deputy District Attorney

Court of Appeal of the State of California
in and for the
First Appellate District

Division Three

No. 44994

Superior Court 9132-C

Michael M.,
Petitioner,

vs.

Superior Court, County of Sonoma,
Respondent,

People of the State of California,
Real Party in Interest.

[Filed Sept. 14, 1978]

By the Court:

The petition for writ of prohibition is denied.

Dated Sep 14 1978

White, P.J.

1 Civil No. 44994

In the Supreme Court of the State of California

In Bank

Michael M.

v.

The Superior Court of Sonoma County.

[Filed Oct. 12, 1978]

Petition for hearing granted and matter transferred to this court.

Let an alternative writ of prohibition issue, to be heard before this court when the proceeding is ordered on calendar.

The alternative writ is to be issued, served and filed on or before October 18, 1978.

The written return to the writ is to be served and filed on or before November 3, 1978.

Bird,
Chief Justice

Mosk,
Justice

Richardson,
Justice

Manuel,
Justice

Newman,
Justice

In the Supreme Court of the State of California

S. F. 23929
No. 1 Civ. 44994
Superior Court
No. 9132-C

Michael M.,

Petitioner,

vs.

The Superior Court of the State of California, in and for the County of Sonoma,

Respondent,

The People of the State of California,

Real Party In Interest.

[Filed Oct. 18, 1978]

ALTERNATIVE WRIT OF PROHIBITION

To the Superior Court of the State of California, in and for the County of Sonoma, Respondent, and to The People of the State of California, Real Party in Interest:

Upon the filing of a verified petition for writ of prohibition, and good cause appearing therefor, IT IS HEREBY ORDERED that:

The Superior Court of the State of California, in and for the County of Sonoma, is commanded to dismiss the Information in the case entitled "The People of the State of California v. *Michael M.*", Case No. 9132-C, or, in the alternative, to show cause before this Court at a time and place to be specified why you should not be absolutely and perma-

nently restrained from taking any further proceedings against or making any other orders affecting the Petitioner in the proceedings described.

IT IS FURTHER ORDERED that you are directed, pending further order of this Court, to desist and refrain from taking any further proceedings in the action described.

This Writ shall be served on the Respondent and the Real Party In Interest on or before October 18, 1978.

The written return, if any, to this Writ shall be filed and served by the Real Party In Interest on or before November 3, 1978.

Dated: Oct 17, 1978.

G. E. Bishel,
Clerk of the Supreme Court
of the State of California

By J. Kavanaugh
Chief Deputy

[Acknowledgments of Service omitted in printing]

In the Supreme Court of the State of California

S.F. No. 23929

Michael M.
Petitioner,
vs.
The Superior Court of the State of California, in and for the County of Sonoma,
Respondent,
The People of the State of California,
Real Party in Interest.

[Filed Nov. 3, 1978]

RETURN TO ALTERNATIVE WRIT OF PROHIBITION AND MEMORANDUM OF POINTS AND AUTHORITIES

To the Honorable Rose Elizabeth Bird, Chief Justice, and the Associate Justices of the Supreme Court of the State of California:

COMES NOW the Real Party in Interest, the People of the State of California, and submits the following Return to the Alternative Writ of Prohibition and Answer to the Petition.

I

Real Party represents that pursuant to this court's order granting the Alternative Writ, proceedings against petitioner are being held in abeyance pending further order of this court.

II

Real Party denies the allegations in Paragraph 16 of the Petition for Writ of Prohibition for the reasons set forth in the Points and Authorities attached hereto, to wit, that the respondent court was within its jurisdiction in denying Petitioner's motion to set aside the information.

III

In all other respects, Real Party admits the essential allegations of the petition.

WHEREFORE, the People of the State of California, Real Party in Interest, prays that:

1. The relief sought by petitioner herein be denied;

2. The petition for writ of prohibition on file herein be denied;

3. The alternative writ of prohibition previously issued by this court be discharged and the matter remanded to respondent court for trial on the merits of the criminal charges; and

4. This court grant such other relief as may be deemed proper and just.

DATED: November 23, 1978.

Respectfully submitted,
Evelle J. Younger,
Attorney General
Jack R. Winkler,
Chief Assistant Attorney General—
Criminal Division
S. Clark Moore,
Assistant Attorney General
William R. Pounders,
Deputy Attorney General

/s/ Sandy R. Kriegler,
Sandy R. Kriegler,
Deputy Attorney General
Attorneys for Real Party
in Interest

[Verification, Points and Authorities, and Certificate of Service omitted in printing]

[4]

Municipal Court of California, County of Sonoma
Department No. 2

Violation of Section 261.5 of the Penal Code
of the State of California, to wit,
a felony

The People of the State of California,
Plaintiff,

vs.

Michael M.,
Defendant.

[Lodged as an exhibit on Oct. 12, 1978.]

Thursday, July 13th, A. D., 1978 - 1:32 o'clock P.M.

The preliminary hearing of the above-named defendant, *Michael M.*, came on regularly this day at the hour of 1:32 o'clock p.m. thereof, before Honorable Frank J. Passalacqua, Judge of the Municipal Court of California, County of Sonoma, sitting in said Court as a Committing Magistrate.

The People were represented by David L. Dunn, Esq., Deputy District Attorney of Sonoma County, Hall of Justice, 2555 Mendocino Avenue, Santa Rosa, California.

The defendant, *Michael M.*, was personally present and in attendance upon the Court, and was attended and represented by his counsel, Gregory F. Jilka, Esq., Attorney at Law, 8099 La Plaza, Post Office Box 111, Cotati, California, 94928.

[5] Joseph K. McKnight, Certified Court Reporter, was present and acting.

The following proceedings were had and the following testimony was taken, to wit:

The Court: Let's proceed in the *Michael M.* case. Call your first witness.

Mr. Jilka: Your Honor, may I? Before any witnesses are presented, I have had a discussion with Mr. Dunn and I believe that he is prepared to stipulate and make a minor stipulation in this case as to the date of birth of the defendant being December 5th, 1960.

Mr. Dunn: So stipulated.

The Court: The defendant's date of birth is December 5th, 1960.

Mr. Jilka: Your Honor, in light of that at this time—I would like to make a motion at this time, a motion to determine this offense to be a misdemeanor under subdivision b(5) of Penal Code Section 17. The Court is probably aware that under that Section, a crime which is punishable as both a felony and a misdemeanor may be deemed to be a misdemeanor by the Court at any time prior to the preliminary examination or to the conclusion of the preliminary examination. I would point out the case of Esteybar versus Municipal Court 5 Cal 3rd 119, page 126 in which the Court states that a defendant is entitled to have an independent determination of whether he should be held to answer on a felony or a misdemeanor.

In support of this motion in the case of my client, [6] it should be noted that the victim was approximately 16 and a half years old at the time of the offense. The defendant

was approximately 17 and a half years old. There is a one-year, eighteen day difference in their ages. There is no allegation of force. This is simply not the case where a 42-year old man is charged with seducing a babysitter or anything like that.

What we have here is the case where the defendant and the victim are both minors and they are close in age. Now, under these circumstances, we don't feel that the allegation of the felony is proper. I would point out to the Court that in other states the age for unlawful intercourse is lower than in this state, in some cases as low as 14. For example, in New Hampshire. It is difficult to conceive of the facts as alleged in this Complaint being a felony in California and not criminal conduct at all in other states. We feel that the interests of justice require, in this case, that the charge be deemed a misdemeanor. This will save much tax payers time and money in the prosecution of this case.

The Court: Very well. The motion will be submitted. I will make a determination after hearing the evidence at this preliminary examination.

Mr. Jilka: Very well, your Honor.

The Court: Call your first witness.

Mr. Dunn: The People would call *Sharon.*

The Clerk: Raise your right hand, please.

[7] *SHARON*

produced as a witness in behalf of the People, having been first duly and regularly sworn by the Clerk to testify the truth, the whole truth and nothing but the truth, testified as follows, to wit:

The Clerk: Take the stand.

DIRECT EXAMINATION

BY MR. DUNN:

Q. Would you please state your full name and spell your last name?

A. *Sharon* * * *

Q. Is that Miss or Mrs.?

A. Miss.

The Court: Sharon, would you slide over in front of the microphone, please, so that it picks up your voice?

BY MR. DUNN:

Q. What city do you reside in?

A. Rohnert Park.

Q. What is your occupation?

A. A student.

Q. What is your date of birth?

A. 12/23/61.

Q. What was your age on June the 4th of this year?

A. Sixteen.

Q. Sixteen?

A. Yes.

[8] Q. Now, on June 4th of this year, were you married to the defendant in this action?

A. No.

Q. Have you ever been married to the defendant?

A. No.

Q. On June the 4th, at approximately midnight — midnight of June the 3rd, were you in Rohnert Park?

A. Yes.

Q. Is that in Sonoma County?

A. Yes.

Q. Did anything unusual happen to you that night in Rohnert Park?

A. Yes.

Q. Would you briefly describe what happened that night? Did you see the defendant that night in Rohnert Park?

A. Yes.

Q. Where did you first meet him?

A. At a bus stop.

Q. Was anyone with you?

A. My sister.

Q. Was anyone with the defendant?

A. Yes.

Q. How many people were with the defendant?

A. Two.

Q. Now, after you met the defendant, what happened?

A. We walked down to the railroad tracks.

Q. What happened at the railroad tracks?

A. We were drinking at the railroad tracks and we walked [9] over to this bush and he started kissing me and stuff, and I was kissing him back, too, at first. Then, I was telling him to stop —

Q. Yes.

A. — and I was telling him to slow down and stop. He said, "Okay, okay." But then he just kept doing it. He just

kept doing it and then my sister and two other guys came over to where we were and my sister said — told me to get up and come home. And then I didn't —

Q. Yes.

A. — and then my sister and —

Q. All right.

A. — David, one of the boys that were there, started walking home and we stayed there and then later —

Q. All right.

A. — Bruce left Michael, you know.

The Court: Michael being the defendant?

The Witness: Yeah. We was laying there and we were kissing each other, and then he asked me if I wanted to walk him over to the park; so we walked over to the park and we sat down on a bench and then he started kissing me again and we were laying on the bench. And he told me to take my pants off.

I said, "No," and I was trying to get up and he hit me back down on the bench and then I just said to myself, "Forget it," and I let him do what he wanted to do and he took my pants off and he was telling me to put my legs around him and stuff —

[10] Mr. Dunn: All right.

The Witness: — and then when he was —

Mr. Dunn: Excuse me just a moment:

BY MR. DUNN:

Q. Did you have sex?

Mr. Jilka: Your Honor, may she finish, please?

The Court: You may interrupt during the course of a narrative. Go ahead.

BY MR. DUNN:

Q. Did you have sexual intercourse with the defendant?

A. Yeah.

Q. He did put his penis into your vagina?

A. Yes.

Q. You said that he hit you?

A. Yeah.

Q. How did he hit you?

A. He slugged me in the face.

Q. With what did he slug you?

A. His fist.

Q. Where abouts in the face?

A. On my chin.

Q. As a result of that, did you have any bruises or any kind of an injury?

A. Yeah.

Q. What happened?

A. I had bruises.

The Court: Did he hit you one time or did he hit you more than once?

[11] The Witness: He hit me about two or three times.

BY MR. DUNN:

Q. Now, you have been describing the defendant as Michael or Mike. Is that individual in the courtroom today?

A. Yes.

Q. Would you please point to him?

A. Right there.

Mr. Dunn: May the record indicate that she has pointed to the defendant?

The Court: It may.

BY MR. DUNN:

Q. Now, during the course of that evening, did the defendant ask you your age?

A. Yeah.

Q. And what did you tell him?

A. Sixteen.

Q. Did you tell him you were sixteen?

A. Yes.

Q. Now, you said you had been drinking, is that correct?

A. Yes.

Q. Would you describe your condition as a result of the drinking?

A. I was a little drunk.

Mr. Dunn: I have no further questions at this time, your Honor.

CROSS-EXAMINATION

BY MR. JILKA:

[12] Q. Miss * * *, what were you doing in Rohnert Park prior to meeting with Mr. *M.*?

Mr. Dunn: Objection, your Honor. That is irrelevant.

Mr. Jilka: Your Honor, I think we are entitled to inquire.

The Court: It is foundational. You may answer.

The Witness: I was waiting at the bus stop for the bus.

BY MR. JILKA:

Q. What had you been doing prior til that, previously?

A. Me and my sister, we left our house and we walked to the liquor store and we bought a half pint of Southern Comfort and we bought two Pepsis to go with it, and we

mixed our drinks. We walked to the bus stop, just waited and that is when Michael and two other guys came walking up.

Q. Did you buy the Southern Comfort?

Mr. Dunn: Objection. That is irrelevant, your Honor.

Mr. Jilka: Well, your Honor, I think here it is correct. As a witness, it has something to do with her state of sobriety. This is foundational to that.

Mr. Dunn: She has already testified as to her state of sobriety, your Honor.

Mr. Jilka: Well, this is cross-examination.

The Court: Well, the objection is sustained.

BY MR. JILKA:

Q. What size of Southern Comfort did you buy?

[13] A. A half pint.

Q. Did you buy it yourself?

A. No, my sister did.

Q. What is your sister's name?

A. Debra.

Q. How old is she?

A. Twenty-one.

Q. Did you drink any of the Southern Comfort from that bottle?

A. Yeah.

Q. How much did you drink?

A. About half of it.

Q. Okay. How much do you weigh?

A. 122.

Q. When did you start drinking that evening?

A. Around 11:00—about 10:30 or 11:00 o'clock.

Q. Did you ever drink before that night?

M. Dunn: Objection, your Honor. That is irrelevant.

Mr. Jilka: Your Honor, the amount of alcohol she consumed is only one factor in determining her sobriety. Now, if she had a drink before that night: it is likely that the alcohol would have had greater effect than if she had regularly consumed it.

The Court: The objection is sustained.

By Mr. Jilka:

Q. You stated you were mixing the Southern Comfort with coke?

[14] A. Pepsi.

Q. Pepsi?

A. Yes.

Q. How did you feel the next day? Did you have a headache?

A. No, I was just tired.

Q. Did you feel nauseated?

A. No.

Q. Did you have anything to eat that night?

A. No.

Q. Nothing at all. When was your last meal prior to starting to consume the Southern Comfort?

A. It was around noon.

Q. Around noon. What did you have to eat?

A. I don't remember.

Q. Do you remember if it was a big meal or a small meal?

A. No.

Q. How did you happen to meet with Mr. *M.*

A. Him and his friends was riding bikes. They went past us, then they came back and they asked us if we wanted to drink some wine.

Q. Who were his friends? Did you know them?

A. No.

A. Do you know their names?

A. Yeah.

Q. What are their names?

A. Bruce Harper and David Simonpietri.

Q. Did you know either of these two people before that night?

[15] A. No.

Q. What was your reply to this inquiry concerning whether or not you wanted to go drinking?

A. We wasn't going to go at first, but then we started talking with them for about ten minutes. Then we decided we would; so we walked out to the railroad tracks.

Q. How far away are the railroad tracks from where you met the boys?

A. I don't know how far it was.

Q. Was it more than ten blocks?

A. No.

Q. Do you remember how long it took you to walk to the railroad tracks?

A. About 20 minutes.

Q. Twenty minutes?

A. Yes.

Q. Did anything unusual happen while you were walking to the railroad tracks?

A. No.

Q. Did you and Mr. *M.* start to hold hands?

A. When we were at the railroad tracks.

Q. Did you hold hands with him before then?

A. No.

Q. How far down the railroad tracks were you walking from the road?

A. I don't know. It wasn't very far. I don't remember.

Q. What did you first do when you got there?

A. We sat down by the railroad tracks and we started talking **[16]** and drinking.

Q. Had you been drinking while you were walking?

A. Yeah.

Q. What were you drinking while you were walking?

A. Southern Comfort, and Pepsi.

Q. How long did you sit there and talk at the railroad tracks?

A. About an hour; a couple of hours.

Q. And who was with you at that time?

A. My sister and I and Michael and David and Bruce.

Q. So there were a total of five people?

A. Yeah.

Q. And this is your sister named what?

A. Debra.

Q. Debra?

A. Yeah.

Q. Did you have any occasion to leave the group while you were there at the railroad tracks?

A. I don't understand the question.

Q. Did you go out by yourself or away from the others?

A. No.

Q. Did you go off with Mr. *M.* away from the others?

A. Yeah.

Q. Why did you do that?

A. I don't know. I guess I wanted to.

Q. Did you have any need to go to the bathroom when you were there?

A. Yes.

[17] Q. And what did you do?

A. Me and my sister walked down the railroad tracks to some bushes and went to the bathroom.

Q. Now, you and Mr. *M.*, as I understand it, went off into the bushes, is that correct?

A. Yes.

Q. Okay. And what did you do when you and Mr. *M.* were there in the bushes?

A. We were kissing and hugging.

Q. Were you sitting up?

A. We were laying down.

Q. You were lying down. This was in the bushes?

A. Yes.

Q. How far away from the rest of them were you?

A. They were just bushes right next to the railroad tracks. We just walked off into the bushes; not very far.

Q. Could you hear the other people talking?

A. No.

Q. Did you do anything other than hugging and kissing when you were in the bushes with Mr. *M.*?

A. No.

Q. Did you ever touch his penis?

A. No.

Q. Did you state that at that time he tried to get your pants off?

A. In the bushes?

Q, Yes. Did he?

A. No.

[18] Q. Okay. Did anything else unusual happen when you were out in the bushes with Mr. *M.*?

A. No.

Q. Did he hit you then?

A. I think—yeah—I don't remember.

Q. You think he hit you but you don't remember. How many times did he hit you?

A. I don't remember.

Q. Did you—excuse me—Did you hit him?

A. No.

Q. You didn't hit him?

A. (Negative head shake.)

Mr. Jilka: May the record indicate the witness is nodding her head in the negative?

The Court: I didn't see it.

By Mr. Jilka:

Q. Did you hit Mr. *M.* at that time?

A. No.

Q. Thank you. How long were you and Mr. *M.* off by yourselves?

A. About thirty minutes.

Q. Thirty minutes?

A. Yeah.

Q. Then did you come back with the group, or what happened?

A. No. My sister and the other guys came over there. They went home. It was just me and Michael and then we walked to the park.

[19] Q. So your sister and the other two boys came over to where you were, you and Michael were, is that right?

A. Yeah.

Q. What did they say to you, if you remember?

A. My sister didn't say anything. She said, "Come on, Sharon, let's go home."

Q. She asked you to go home with her?

A. (Affirmative nod.)

Q. Did you go home with her?

A. No.

Q. You wanted to stay with Mr. *M.*?

A. I don't know.

Q. Was this before or after he hit you?

A. Before.

Q. Okay. So it was—So then what happened, did—Did the group of—the three of them leave? Did all three of them leave, your sister and the two boys?

A. My sister and David left first and then Bruce left after they did.

Q. How long did Bruce stay around?

A. About five minutes.

Q. What happened in the five minutes that Bruce stayed there with you and Michael?

A. I don't remember.

Q. You don't remember at all?

A. (Negative head shake.)

Q. Did you have occasion at that time to kiss Bruce?

A. Yeah.

Q. You did? You were kissing Bruce at that time?

[20] A. (Affirmative nod.)

Q. Was Bruce kissing you?

A. Yes.

Q. And were you standing up at this time?

A. No, we were sitting down.

Q. You were sitting down, so you had left Mr. *M.* and you were making out with this fellow Bruce?

Mr. Dunn: Objection to using the words "making out".

Mr. Jilka: I will rephrase the question.

The Court: All right.

Mr. Dunn: I believe she testified she was kissing him.

By Mr. Jilka:

Q. Okay. So at this point in time you had left Mr. *M.* and you were hugging and kissing with Bruce, is that right?

A. Yeah.

Q. And you were sitting up?

A. Yes.

Q. Was your sister still there then?

A. No. Yeah, she was at first.

Q. What was she doing?

A. She was standing up with Michael and David.

Q. Yes. Was she doing anything with Michael and David?

A. No, I don't think so.

Q. Whose idea was it for you and Bruce to kiss? Did you initiate that?

A. Yes.

[21] Q. What happened after Bruce left?

A. Michael asked me if I wanted to go walk to the park.

Q. And what did you say?

A. I said, "Yes."

Q. And then what happened?

A. We walked to the park.

Q. Do you know where this park is?

A. I don't remember where it was.

Q. How long did it take you to get to the park?

A. About ten or fifteen minutes.

Q. And did you walk there?

A. Yes.

Q. Did Mr. *M.* ever mention his name?

A. Yes.

Q. What did he tell you with respect to his name?

A. He says—He was telling us his name was *Michael M.*

Q. He said it like that: *"Michael M."*

A. Yes.

Q. What did you do once you got to the park?

A. Sat on the bench.

Q. And then what happened?

A. Then he started kissing me.

Q. Did you kiss him back?

A. I don't think so, no.

Q. What did you do?

A. I was trying to make him stop it and then we were laying on the bench.

[22] Q. How did you get to the lying position?

A. We just layed down.

Q. So you lay down with him, is that right?

A. Yeah.

Q. Then what happened?

A. And then he told me to take my pants off and I said, "No." And I was trying to get up and he hit me back down.

Q. Then what happened?

A. Then he took my pants off.

Q. Did you resist when he took your pants off?

A. No.

Q. Did he take your pants off before he hit you or after?

A. After

Q. Okay. Then what happened?

A. And then he took my pants off. He was telling me to put my legs around him.

Q. Did you ever fall down that night?

A. No.

Q. Do you think you might have fallen down and not remembered it?

A. No.

Q. The next day did you have occasion to ride around in a police car?

A. Yeah.

Q. Okay. And when you were riding around in the police car, did you tell the policeman that you recognized the person that you were with the night before?

A. I don't understand the question.

[23] Q. When you were riding around in the police car, did you see a man in a front yard?

A. Yeah.

Q. Okay. Did you tell the policeman something about that man?

A. My sister said, "That is him." I looked and I said, "Yeah, I think it is."

Q. So meaning that this was the man that you had intercourse with the prior night?

A. Yeah.

Q. Is that man here in the courtroom today?

A. No.

Q. He is not here today?

A. (Negative head shake.)

Q. That man is not Mr. *M.* next to me?

A. No.

Q. When you got a closer look at the man, did you tell the policeman that you had made a mistake?

A. No. Yeah, yeah.

Q. How soon after?

A. After I found out his age.

Q. And how long after you saw the man first did you find out what his age was?

A. About fifteen minutes.

Q. Did they handcuff the man and take him to the police station first?

A. Yeah.

Q. How did you find out what the man's age was?

[24] A. I seen his driver's license.

Q. The police showed you his driver's license?

A. Yeah.

Q. Did the police show you any photographs that day?

A. Yeah.

Q. How many photographs did they show you?

A. Oh, I was looking in a pack of photos, the pictures, and then he showed me—and then he showed me this thing with about seven pictures on it.

Q. He showed you this thing without about seven pictures on it. What kind of a thing do you mean?

A. I was a piece of paper or something.

Q. Was it lying on a table flat or something like that?

A. No. He handed it to me and I looked at the pictures.

Q. Could you see all of the pictures at the same time?

A. Yeah, they were all lined up.

Q. Were they all the same size?

A. Yeah.

Q. Do you remember the colors, if the pictures were color—or black and white?

A. Colored.

Q. They were all colored?

A. I think so.

Q. Were there any names on the pictures?

A. Huh-uh.

Q. Were there any numbers on the pictures?

A. I don't remember.

Q. Did you ever see Mr. *M.* in the daylight?

[25] A. No.

Q. It was always at night when you were with him?

A. Yes.

Q. Did you see him around streetlights at all, or was it pretty much dark when you saw him?

A. Yeah. I seen him in the streetlights.

Q. Do you remember how close you were to the streetlights when you saw him?

A. Right underneath the streetlights.

Q. Did you see him well or dimly or—

A. I seen him well.

Q. Had you ever had sexual intercourse before that night?

Mr. Dunn: Objection, your Honor.

The Court: Sustained.

Mr. Jilka: Nothing further.

The Court: Thank you. You may step down.

(Witness excused.)

The Court: Further witnesses?

(Whereupon, the District Attorney confers privately with the investigating officer, Robert Wieworka.)

Mr. Dunn: The People would call Detective Wieworka.

The Court: What for?

Mr. Dunn: Your Honor—

The Court: For what?

Mr. Dunn: —Detective Wieworka is required to testify as to the statements that were made by the defendant **[26]** on his apprehension.

The Court: Do you know what they are?

Mr. Dunn: Yes, sir.

The Court: Do you have them in the report?

Mr. Jilka: I don't see the point, your Honor.

The Court: I don't either. Mr. Dunn insists on overplaying every one of his cases.

Mr. Dunn: The People have no further witnesses.

The Court: Very well. Do you have comment with reference to the motion that was earlier made, Mr. Dunn?

Mr. Dunn: I think the only comment that I would make at this time would be the fact that the witness did testify that there was physical assault, your Honor. He used his fist and struck her two or three times, and so there was some degree of physical coercion involved in this incident. It wasn't a case where she voluntarily submitted to the act.

The Court: Very well. After hearing the evidence, the Court is convinced it should go on to the Superior Court and I am going to deny the 17b(5) motion,

The Court finds there is sufficient evidence to hold the defendant to answer to the felony alleged in the Complaint herein.

The Information will be filed in the Superior Court on the 28th day of July at 8:30 in Department No. 2 of the Superior Court. Absent the reason I take it under submission — absent the circumstances testified to here, Mr. Jilka, I think this Court would have had this—had **[27]** this been a situation of mutual admiration for one another under the influence — but with the state of a misdemeanor level — There is a little bit more to it than that. I do want you to remind me if this comes back as a misdemeanor, again that the People put the taxpayers to — in the event they decide to come back here as a misdemeanor — because I am not going to handle it.

Mr. Jilka: Very well, your Honor.

The Court: I think the defense would be in a very advantageous position if this should come back. I have been given too many 17b(5)'s, either stipulated or suggested.

Any way, then they come back. After all the District Attorney's office has hard put the taxpayers to — Very well. We stand recessed.

(Whereupon, at the hour of 2:01 o'clock p.m. this day, this preliminary examination is concluded.)